

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

NICHOLAS MARTIN on behalf of himself and others similarly situated, Plaintiff,)	
	)	1:10-cv-3494
)	
v.	)	Judge Dow
)	
CCH, INCORPORATED,	)	Magistrate Judge Ashman
Defendant.)	
	)	JURY DEMANDED

**THIRD PARTY 21st CENTURY TAX SERVICES, INC MOTION TO QUASH SUBPOENA
AND FOR PROTECTIVE ORDER**

Third party 21st Century Tax Services, Inc. ("21st Century"), a third party respondent to a subpoena issued by CCH, Inc., respectfully requests that this Court issue an order quashing the subpoena attached as Exhibit A, and for a protective order prohibiting defendant from attempting to contact its clients. In support of this motion, 21st Century states:

1. This is a Telephone Consumer Protection Act, 47 U.S.C. §227(b) class action challenging defendant CCH, Inc.'s practice of calling the cell phones of class members, including plaintiff, using an autodialer and prerecorded message. CCH has produced phone records indicating that it made hundreds of thousands of calls, and has not produced any evidence that any recipient of such calls consented to receive them.

2. Movant 21st Century is a tax preparation business owned by plaintiff Nicholas Martin. 21st Century uses plaintiff's cellular telephone number as its contact phone number. This is the telephone number that defendant called using the proscribed equipment. On April 4, 2011, CCH issued the subpoena attached as Exhibit A, which asks for production of voluminous, highly confidential documents within one week, by April 11, 2011.

3. This motion seeks an order quashing Exhibit A because the subpoena did not provide a reasonable time for compliance, because it is unreasonably intrusive into the private financial affairs of 21st Century's clients, because 21st Century and plaintiff have already agreed to provide all possibly relevant information and because it is otherwise objectionable in several material respects.

4. This motion also seeks a protective order prohibiting CCH from contacting 21st Century's clients, a questionable tactic that CCH has indicated it intends to employ in order to prove that 21st Century used plaintiff's cell phone; a fact that is uncontested in this litigation.

Motion to Quash

5. Fed.R.Civ.P. 45(c)(3)(A) requires a court to quash a subpoena that is improper for any of the following reasons:

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(Emphasis added). Exhibit A should be quashed because it satisfies three of these four criteria, any one of which is sufficient to compel quashing the subpoena: it does not allow a reasonable

time to comply, because it requires disclosure of privileged or other protected matter, and because it subjects respondent to undue burden.

6. Reasonable Time to Comply. One calendar week is not a reasonable time to comply with any subpoena. Fed.R.Civ.P. 34(b) provides that a party responding to a request for documents must respond within 30 days; CCH's demand falls far short of this benchmark. Further, the seven day notice was unreasonable because of the breadth of the demand, which asks for "all documents relating to 21st Century Tax Services, Inc...." Exhibit A at request 1. 21st Century is a small business with one employee. Seven days was not reasonable.

7. Privileged or other Protected Matter. Although probably encompassed within request 1, Exhibit A request 5 also expressly demands that 21st Century produce tax returns and "supporting documentation" for its clients within the past five years. This information is protected by the IRS code and implementing regulations.

8. 26 U.S.C. §7216, and its implementing/corresponding regulation, 26 C.F.R § 301.7216-1, make it a crime for a tax preparer such as 21st Century to provide this information:

301.7216-1 Penalty for disclosure or use of tax return information.

(a) In general. Section 7216(a) provides in effect that, except as provided in section 7216(b), any tax return preparer (as described in paragraph (b)(2) of this section) who on or after January 1, 1972, discloses or uses any tax return information (as described in paragraph (b)(3) of this section) other than for the specific purpose of preparing, assisting in preparing, or obtaining or providing services in connection with the preparation of, any tax return of the taxpayer by or for whom the information was made available to a tax return preparer, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Pursuant to section 7216(b), the provisions of section 7216(a) and this paragraph do not apply to any disclosure or use permitted under § 301.7216-2 or § 301.7216-3.

26 U.S.C. §§ 6103 "Confidentiality and disclosure of returns and return information" and 7216, "Disclosure or use of information by preparers of returns" also prevent production of this information.

9. "Income tax returns are confidential communications between a taxpayer and the government." *Cohn v. Taco Bell Corporation*, 1994 WL 383975 (N.D. Ill. 1994), citing *Federal Savings & Loan Insurance Corporation v. Krueger*, 55 F.R.D. 512, 514 (N.D. Ill. 1972).

10. Courts analyzing the discoverability of income tax returns have held that there is a strong policy against their disclosure. "This policy is grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue. To indiscriminately compel a taxpayer to disclose this information merely because he has become a party to a lawsuit would undermine this policy." *Krueger*, 55 F.R.D. at 514. This Court recognized the confidentiality of tax returns during oral argument as to plaintiff's December 2010 motion to compel. Exhibit B at 22-24.

11. Other courses have held that tax returns are protected from disclosure by a qualified privilege. Under that standard, the subject tax returns should not be disclosed here. *Gattengo v. PriceWaterhouseCoopers*, 205 F.R.D. 70,72-73 (D. Conn. 2001) held that tax returns are only discoverable if: (1) it clearly appears they are relevant to the subject matter of the action; and (2) there is a compelling need for the tax returns because the information contained therein is not otherwise readily obtainable. Here, as explained more fully below, the tax returns of unrelated third parties are sought from their tax preparer 21st Century, apparently to show that 21st Century holds the telephone number CCH called in violation of the TCPA out as its telephone number.

12. However, both plaintiff and 21st Century have offered to enter into a written stipulation stating that the phone number was used by 21st Century. Exhibit C. CCH has, to date, refused, instead insisting that no stipulation in this case would be sufficient unless plaintiff concedes that he consented to receive the illegal calls; a wholly unreasonable position.

13. In sum, the requested information requested is squarely “protected” and “privileged” within the meaning of Fed.R.Civ.P. 45(c)(3), and the subpoena should be quashed.

14. Undue Burden. While 21st Century and plaintiff both recognize that there is a close relationship between respondent and plaintiff, this relationship does not provide CCH *carte blanche* to demand anything it thinks might lead to disclosure of some fact favorable to it. Given the scope of the requests and CCH’s steadfast refusal to accept a stipulation, it seems likely that the records have been requested for the purpose of harassment. The discovery rules apply to subpoenas just as they apply to discovery, and as explained below, the subpoena here demands documents that are unnecessary to any issue in this case, and are not reasonably calculated to lead to admissible evidence.

15. Exhibit A essentially asks for all documents that have anything to do with respondent from the last ten years. This request is unduly burdensome, and the possible benefit is far outweighed by the burden of producing every piece of paper “regarding” 21st Century.

16. As laid out in Exhibit C, 21st Century has offered to stipulate that it held the subject phone number out to be its phone number. This offer moots all reasons CCH has provided to plaintiff and 21st Century why it needs any of the information subpoenaed. Production of any materials at all, in light of this offered stipulation, is an undue burden.

17. This subpoena is really a “fishing expedition.” CCH has not shown any need for the materials, other than to prove that 21st Century used the phone number, which has been conceded. Aside from this, CCH has not identified any information that *might* exist in the requested materials, that would justify the intrusion and burden of permitting such discovery. *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d, 923, 927 (7th Cir. 2004); *Sirazi v. Panda Express, Inc.*, No. 08 C 2345, 2009 WL 4232693, at *3 (N.D. Ill. Nov. 24, 2009). In other words, the need for the materials does not justify the burden and invasion of privacy.

18. The fact is that CCH is grasping at straws in order to find some kind of information that would be favorable to its case. On December 7, 2010, Judge Ashman compelled CCH, among other things, to produce all information, documents and data concerning any affirmative defense it raised, including “prior express consent.” Exhibit B at 22-24.

19. Nearly five months later, with discovery scheduled to close on April 25, 2011, CCH has failed to produce a shred of information, a single page or a byte of data that tends to show that Martin (or 21st Century) consented to receive robocalls from CCH. This subpoena appears to be CCH’s last ditch attempt to find *some* kind of evidence to persuade the Court that plaintiff consented to receive the call; proof that CCH was required to have had before it made the call in the first place. This is a textbook fishing expedition. If CCH had consent to call plaintiff, then it should have had this information before it made the call. Bothering 21st Century, its clients and plaintiff for documents and information will not change the fact that it did not have consent. And certainly is not appropriate in light of the proffered stipulation.

Motion for Protective Order

20. CCH has also indicated in court filings and during Rule 37 talks with plaintiff's counsel that it intends to subpoena 21st Century's clients. There is no reasonable justification for bothering plaintiff's clients, who have nothing to do with this case, with a subpoena, and 21st Century therefore requests that the Court issue a protective order preventing such.

21. Fed.R.Civ.P. 26(c) permits the Court to issue a protective order:

(c) Protective Orders.

(1) In General.

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (A) forbidding the disclosure or discovery;
- (B) specifying terms, including time and place, for the disclosure or discovery;
- (C) prescribing a discovery method other than the one selected by the party seeking discovery;
- (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (E) designating the persons who may be present while the discovery is conducted;
- (F) requiring that a deposition be sealed and opened only on court order;
- (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

22. Again, any attempt to contact the clients of 21st Century would be an impermissible fishing expedition. *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d, 923, 927 (7th Cir. 2004); *Sirazi v. Panda Express, Inc.*, No. 08 C 2345, 2009 WL 4232693, at *3 (N.D. Ill. Nov. 24, 2009). CCH has not shown any need for the documents, and has not identified any information that *might* exist therein, or be held by 21st Century's clients, that would justify the intrusion and burden of permitting such discovery.

23. Furthermore, the tax preparer-client relationship is a delicate one, and having CCH, a potential competitor of 21st Century, contacting these persons in order to snoop around without any real goal may lead to either 21st Century losing the client, and/or CCH gaining a client.

24. For these reasons, 21st Century requests that this Court issue an order preventing CCH from attempting to contact its clients. Those persons have nothing to do with this case, and CCH should not be bothering them.

WHEREFORE, 21st Century respectfully requests that this Court enter an order quashing the subpoena attached as Exhibit A, and prohibiting CCH from attempting to contact 21st Century's clients.

Respectfully submitted,

/s/ Alexander H. Burke

Alexander H. Burke

BURKE LAW OFFICES, LLC

155 N. Michigan Ave., Suite 9020

Chicago, IL 60601

(312) 729-5288

(312) 729-5289 (fax)

ABurke@BurkeLawLLC.com

www.BurkeLawLLC.com

Exhibit A

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

Nicholas Martin

Plaintiff

v.

CCH, Inc.

Defendant

Civil Action No. 10-cv-3494

(If the action is pending in another district, state where:

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTIONTo: 21st Century Tax Services, Inc., c/o Alex Burke, Burke Law Offices, LLC
155 North Michigan Avenue, Suite 9020, Chicago, IL 60601; e-mail: ABurke@BurkeLawLLC.com

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See Attached Rider

Place: 77 West Wacker Drive, Suite 4100,
Chicago, IL 60601-1818

Date and Time:

04/11/2011 9:00 am

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 04/04/2011

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Sarah A. Zielinski
Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) CCH, Inc.

, who issues or requests this subpoena, are:

Sarah A. Zielinski, McGuireWoods LLP, 77 West Wacker Drive, Suite 4100, Chicago, IL 60601-1818;
e-mail address: szielinski@mcguirewoods.com; telephone: 312-849-8100

Civil Action No. 10-cv-3494

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for (name of individual and title, if any) 21st Century Tax Services, Inc.
was received by me on (date) 04/04/2011.

☒ I served the subpoena by delivering a copy to the named person as follows: by sending a copy of same
to Alex Burke, who has agreed to accept service on behalf of 21st Century Tax Services, Inc., via e-mail and
United States first class mail on (date) 04/04/2011 ; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: 04/04/2011

Sarah Zielinski
Server's signature

Sarah Zielinski, Attorney
Printed name and title

77 West Wacker Drive, Suite 4100, Chicago, IL 60601-1818

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)**(c) Protecting a Person Subject to a Subpoena.**

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Rider to Subpoena

Instructions

1. For each document request herein to which you seek not to respond under a claim of privilege, discovery immunity, or for any other reason, provide a statement that sets forth the privilege, privileges, immunity or immunities asserted.

2. These document requests are continuing. In the event that any responsive information, documents, or materials come to your attention or come into your knowledge, possession, custody or control after the filing of your responses hereto, you are directed to supplement your responses to these requests and to produce the requested documents.

3. The particularity or generality of any enumerated document request does not limit the scope of any other paragraph.

4. If an objection is made, the reasons shall be separately stated, with specificity..

5. Unless otherwise noted, the time period for these document requests is from January 1, 2001 to the present.

Definitions

1. Document. The meaning of the term "document" includes any recorded, printed, typewritten, or handwritten matter, or reproduction thereof, of whatever character, including without limitation, correspondence, memoranda, tape recordings, minutes of meetings or conferences, contracts, agreements, drafts, letters, telegrams, telexes, e-mails, facsimiles, handwritten or typewritten notes, reports, summaries, charts, graphs, logs, lists, calendars, diaries, studies, analysis, data computations, and computer printouts, whether original or copies.

2. Person. The term "person" is defined as any natural person or any business, legal or governmental entity or association.

Document Requests

1. All documents relating to 21st Century Tax Services, Inc. including, but not limited to the articles of incorporation, annual reports, bylaws, and documents identifying the officers, directors, members, and employees of 21st Century Tax Services, Inc.

2. Any and all documents showing either the name and/or contact information for any person or entity associated with 21st Century Tax Services, Inc.

3. Any and all documents where phone number 630-████-3271 is depicted as the phone number for 21st Century Tax Services, Inc.

4. Any and all advertisements for 21st Century Tax Services, Inc.

5. All federal and state income tax returns and any supporting documentation filed by 21st Century Tax Services, Inc. in the past five years.

6. All federal and state income tax returns and any supporting documentation filed by 21st Century Tax Services, Inc. on behalf of any other persons or businesses in the past two years.

7. Phone billing records for any and all phones used by 21st Century Tax Services, Inc. to make or receive telephone calls from June 8, 2006 to June 8, 2010.

8. A list of all clients and/or prospective clients of 21st Century Tax Services, Inc., including the client's name, address, telephone number, and contact person, for the past two years.

9. A list of all third parties to whom 21st Century Tax Services, Inc. has provided phone number 630-█-3271 for the past two years.

Exhibit B

Alex Burke

From: Alex Burke <ABurke@BurkeLawLLC.com>
Sent: Monday, April 11, 2011 4:33 PM
To: 'Zielinski, Sarah A.'
Cc: 'Groh, Susan E.'; 'Hartsell, David L.'
Subject: Subpoena to 21st Century Tax Services, Inc. Objection
Attachments: 21st Century Responses to Subpoena.pdf

Counsel,

21st Century Tax Services, Inc. ("21st Century") objects to this subpoena. Before we go into some of the specific objections, please know that we are trying in good faith to provide defendant with what it needs in order to assert any defense that is supported by the facts.

Indeed, we understand that part of CCH's "prior express consent" defense is that it had consent to call the phone number because 21st Century held the number out as its phone number. While we do not believe this will win the day as to "prior express consent" because the phone number was never provided to CCH, we understand that CCH might be entitled make the argument that having a phone number that is used in advertisements, gave to clients and submitted to the IRS somehow meant that CCH could autodial the number. We also understand that this is the reason CCH wants the information sought in its subpoena.

We note that plaintiff and 21st Century Tax Services, Inc. have attempted to voluntarily provide the information requested in the subpoena. To wit, on April 6, 2011 (below), we offered that the parties stipulate to the following:

Plaintiff Nicholas Martin stipulates that 21st Century Tax [Services, Inc.] held 630-████ 3271 out to be its phone number when it filed tax returns on behalf of its clients, when it communicated with customers and prospective customers, when it advertised and when it communicated with third parties. 21st Century Tax did not provide any such information to CCH, Inc. or any of its affiliates

This proposal would give CCH what it wants, and would permit 21st Century to maintain the strict confidentiality of its clients and clients' information. Sarah Zielinski responded on April 6, stating that CCH would not agree to any stipulation unless plaintiff stipulated that he consent to receive the calls. We do not think this is a good faith effort to resolve the issue, and request that the parties continue to meet and confer. Frankly, before CCH filed its related motion to compel, we believe that CCH was still considering this proposal.

Second, we note that CCH was compelled to provide all information and documents concerning its affirmative defense, and has not produced a shred of information concerning plaintiff or 21st Century. This subpoena is therefore a fishing expedition, designed to harass plaintiff and his livelihood, and also with the promise to bother 21st Century's clients in the future.

Third, the subpoena asks that 21st Century, a tax preparation company, provide information concerning its clients to CCH. This information would violate 26 C.F.R § 301.7216-1, which makes it a crime for plaintiff or 21st Century to provide this information.

Fourth, the subpoena provides only seven calendar days to respond. Pursuant to Federal Rules 34 and 45, a party has 30 days within which to respond to document requests. Even if there was no 30 day rule, seven days is not a reasonable amount of time to respond. For this reason, and because we question whether this subpoena is appropriate at all given the above, we have not yet done a privilege log.

Fifth, the scope of materials sought is exceedingly overbroad. For example, it is unfair to ask 21st Century for "all documents regarding 21st Century..." as item 1 on the document rider does. The same goes with asking for all documents that show contact information for "any person or entity associated with" 21st Century.

Sixth, the chronological scope of the request is overly broad, going back ten years. There is no justification for asking for materials going back this far.

We urge CCH to please reconsider its position with regard to the stipulation. We think it provides CCH with everything it could possibly get through the subpoena, and will avoid causing 21st Century to have to go through the materials requested, which are improper in the first place.

We will likely be filing a motion to quash the subpoena in order to preserve 21st Century's objections, but request that the parties meet and confer so that they can figure out how to get CCH what it wants, without the burden of having to respond fully to this inappropriate subpoena. Even after the motion to quash, the parties should continue to meet and confer.

Alex Burke

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From: Zielinski, Sarah A. [mailto:SZielinski@mcguirewoods.com]
Sent: Wednesday, April 06, 2011 5:32 PM
To: Alex Burke
Cc: Groh, Susan E.; Hartsell, David L.
Subject: RE: Your Motion to Compel

Hi Alex,

As I'm sure you have figured out, the reason that we are seeking discovery related to Martin's distribution of his cell phone number as the business number for 21st Century Tax is to establish our defense of consent. As the Seventh Circuit stated in the CE Limited case, consent is a case-by-case analysis that depends on how and to whom the phone number in question was distributed. So, unless you are willing to stipulate that Martin consented to be called, a stipulation is not going to eliminate our need for discovery on this issue.

Sarah A. Zielinski
McGuireWoods LLP
77 West Wacker Drive
Suite 4100
Chicago, IL 60601-1818
312.849.8288 (Direct Line)
312.849.3690 (Direct FAX)
szielinski@mcguirewoods.com

This e-mail may contain confidential or privileged information. If you are not the intended recipient, please advise by return e-mail and delete immediately without reading or forwarding to others.

From: Alex Burke [mailto:ABurke@BurkeLawLLC.com]
Sent: Wednesday, April 06, 2011 12:09 PM
To: Zielinski, Sarah A.; Groh, Susan E.; Hartsell, David L.
Subject: Your Motion to Compel

Sarah,

I was surprised to see your motion to compel, because I did not think we were finished talking about these matters.

In particular, we offered to stipulate that 21st Century Tax held the relevant telephone number out as its phone number. I thought you were going to get back to me if this was acceptable.

The stipulation we propose, if CCH is amenable to withdrawing this portion of its motion to compel, is as follows: "Plaintiff Nicholas Martin stipulates that 21st Century Tax held 630-████-3271 out to be its phone number when it filed tax returns on behalf of its clients, when it communicated with customers and prospective customers, when it advertised and when it communicated with third parties. 21st Century Tax did not provide any such information to CCH, Inc. or any of its affiliates."

Please let me know if this would be acceptable to moot sections I and II of your motion to compel.

Alex

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

NICHOLAS MARTIN, on behalf of himself and)	
others similarly situated,	)	1:10-cv-3494
Plaintiff,)	
	)	Judge Dow
v.)	
)	
CCH, INCORPORATED,)	
Defendant.	)	JURY DEMANDED
)	

**THIRD PARTY 21ST CENTURY TAX SERVICES, INC'S
RESPONSES AND OBJECTIONS TO CCH'S SUBPOENA**

Document Requests

1. All documents relating to 21 st Century Tax Services, Inc. including, but not limited to the articles of incorporation, annual reports, bylaws, and documents identifying the officers, directors, members, and employees of 21 st Century Tax Services, Inc.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce "all documents relating to" the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

Plaintiff further objects because providing some of this information would violate 26 U.S.C. §7216, and its implementing/corresponding regulation, 26 C.F.R § 301.7216-1, which makes it a crime for plaintiff or 21st Century to provide this information, and 26 U.S.C. §6103, which prevents production of such information, too. Prudential and privacy reasons, too, mitigate against forcing a tax preparation company to provide its clients' tax returns to a third party.

To the extent that the requesting party would like to know the extent of respondent's use of phone number 630-████ 2371, respondent states that its "articles of incorporation, annual reports, bylaws, and documents identifying the officers, directors, members, and employees of 21 st Century Tax Services, Inc." each will identify that phone number as the phone number of 21st Century Tax Services, Inc.

2. Any and all documents showing either the name and/or contact information for any person or entity associated with 21 st Century Tax Services, Inc.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce “all documents showing the name” of any person “associated” with the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant’s discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

are therefore amount to an impermissible fishing expedition.

Plaintiff further objects because providing some of this information would violate 26 U.S.C. §7216, and its implementing/corresponding regulation, 26 C.F.R § 301.7216–1, which makes it a crime for plaintiff or 21st Century to provide this information, and 26 U.S.C. §6103, which prevents production of such information, too. Prudential and privacy reasons, too, mitigate against forcing a tax preparation company to provide its clients’ tax returns to a third party.

To the extent that the requesting party would like to know the extent of respondent’s use of phone number 630-■■■■ 2371, respondent states that it provided this phone number to lots of people, but never to defendant.

3. Any and all documents where phone number 630-■■■■-3271 is depicted as the phone number for 21 st Century Tax Services, Inc.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce “all documents relating to” the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant’s discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

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To the extent that the requesting party would like to know the extent of respondent's use of phone number 630-████ 2371, respondent states that lots of documents will show that this phone number was provided as the contact number for 21 st Century Tax Services, Inc. to lots of people, but was never provided to defendant.

4. Any and all advertisements for 21 st Century Tax Services, Inc.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce "all documents relating to" the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

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To the extent that the requesting party would like to know the extent of respondent's use of phone number 630-████ 2371, respondent states that lots of documents will show that this phone number was provided as the contact number for 21 st Century Tax Services, Inc. to lots of people, but was never provided to defendant.

5. All federal and state income tax returns and any supporting documentation filed by 21 st Century Tax Services, Inc. in the past five years.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

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makes it a crime for plaintiff or 21st Century to provide this information, and 26 U.S.C. §6103, which prevents production of such information, too. Prudential and privacy reasons, too, mitigate against forcing a tax preparation company to provide its clients' tax returns to a third party.

To the extent that the requesting party would like to know the extent of respondent's use of phone number 630-████ 2371, respondent states that lots of documents will show that this phone number was provided as the contact number for 21 st Century Tax Services, Inc. to lots of people, but was never provided to defendant.

6. All federal and state income tax returns and any supporting documentation filed by 21 st Century Tax Services, Inc. on behalf of any other persons or businesses in the past two years.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.
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To the extent that the requesting party would like to know the extent of respondent's use of phone number 630-████ 2371, respondent states that its "articles of incorporation, annual reports, bylaws, and documents identifying the officers, directors, members, and employees of 21 st Century Tax Services, Inc." each will identify that phone number as the phone number of 21st Century Tax Services, Inc.

7. Phone billing records for any and all phones used by 21 st Century Tax Services, Inc. to make or receive telephone calls from June 8, 2006 to June 8, 2010.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce "all documents relating to" the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it

would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

8. A list of all clients and/or prospective clients of 21st Century Tax Services, Inc., including the client's name, address, telephone number, and contact person, for the past two years.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce "all documents relating to" the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

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21st Century also objects because this request reads more like an interrogatory, rather than like a document request. This list does not currently exist, so it cannot be produced.

9. A list of all third parties to whom 21st Century Tax Services, Inc. has provided phone number 630-████-3271 for the past two years.

Response: Respondent objects because CCH has not provided enough time for respondent to adequately respond. Further, this request is not reasonably calculated to lead to admissible evidence. The request is also overly broad; it is unreasonable to ask a company to produce "all documents relating to" the company. Some documents may also be subject to the attorney-client privilege and work product doctrine. However, this request is so broad that it would be impossible to provide a privilege log. Further, defendant's discovery responses show that defendant has no information that plaintiff consented to receive calls from plaintiff. The requests are therefore amount to an impermissible fishing expedition.

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Plaintiff further objects because providing some of this information would violate 26 U.S.C. §7216, and its implementing/corresponding regulation, 26 C.F.R § 301.7216-1, which makes it a crime for plaintiff or 21st Century to provide this information, and 26 U.S.C. §6103, which prevents production of such information, too. Prudential and privacy reasons, too,

mitigate against forcing a tax preparation company to provide its clients' tax returns to a third party.

21st Century also objects because this request reads more like an interrogatory, rather than like a document request. This list does not currently exist, so it cannot be produced.

/s/Alexander H. Burke
Counsel for 21st. Century Tax Services, Inc.

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Exhibit C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS MARTIN, on behalf)	
of himself and others	)	Docket No. 10 C 3494
similarly situated,)	
	)	Chicago, Illinois
Plaintiff,	)	December 7, 2010
	)	9:30 a.m.
v)	
)	
CCH, Incorporated,)	
)	
Defendant)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARTIN C. ASHMAN

PRESENT:

For the Plaintiff: ALEXANDER H. BURKE
Burke Law Offices, LLC
155 North Michigan Avenue
Suite 9020
Chicago, Illinois 60601

For the Defendant: SUSAN E. GROH
77 West Wacker Drive
Suite 4100
Chicago, Illinois 60601

(TRANSCRIBED FROM DIGITAL RECORDING.)

Court Reporter: Lois A. LaCorte
219 South Dearborn Room 1918
Chicago, Illinois 60604
(312) 435-5558

1 THE CLERK: 10 C 3494, Martin v CCH.

2 MR. BURKE: Good morning, Judge, Alexander Burke for the
3 plaintiff.

4 MS. GROH: Good morning, your Honor, Susan Groh on
5 behalf of the defendant CCH.

6 THE COURT: Good morning. All right, we have
7 plaintiff's motion to compel.

8 MR. BURKE: That's right, Judge. We issued discovery
9 about a month ago and I have gotten almost nothing. We tried
10 to work through this with counsel, several long telephone
11 conversations, long e-mails, still have nothing, so we moved
12 to compel. There are five categories of requests that --

13 THE COURT: Let's take them one by one.

14 MR. BURKE: I would like to start with Section C, which
15 has to do with the dialer and the prerecorded messages and the
16 procedures that the defendant has to make the auto dialed and
17 prerecorded calls.

18 Probably the most fundamental request -- this is on page
19 10 of 15 of our motion -- probably the most fundamental
20 request is interrogatory 5, which asks the defendant to
21 explain their policies, practices, and procedures regarding
22 the use of predictive dialers and prerecorded messages going
23 back to when they began using such. The defendant provided no
24 substantive response to this interrogatory.

25 MS. GROH: Judge, if I may, plaintiff served extensive

1 discovery requests on the defendant before we even filed our
2 answer in this case. As a result, plaintiff's discovery is
3 overbroad, unduly burdensome, and irrelevant. To a large
4 extent --

5 THE COURT: Would you speak a little louder.

6 MS. GROH: Sure.

7 THE COURT: And speak into the mike.

8 MS. GROH: Sure.

9 THE COURT: Thank you.

10 MS. GROH: As I was saying, Judge, plaintiffs served
11 extensive discovery requests on defendant before we even had a
12 chance to answer the complaint. As a result, most of this
13 discovery is extremely broad and irrelevant.

14 Plaintiff requested a Rule 37 conference, which we spent
15 several hours on the phone discussing various issues. In
16 those conversations we provided plaintiff with detailed
17 information about how our calling campaigns work and took him
18 through the steps of that. As a result of these
19 conversations, plaintiff has served us with a second set of
20 discovery which are much more narrowed and focused than his
21 first set of discovery.

22 THE COURT: Is it on the same subject?

23 MS. GROH: Largely, yes, your Honor.

24 MR. BURKE: Some of it is on the same subject, but I
25 think it's two interrogatories and three document requests or

1 something. I mean, I think --

2 THE COURT: Do you have another discovery request that
3 is on this subject?

4 MS. GROH: Yes, your Honor.

5 THE COURT: I'm asking him.

6 MR. BURKE: I think that it touches on some of the
7 subjects that are requested in interrogatory 5, but I don't
8 think that it nullifies interrogatory 5. I mean, I think this
9 is --

10 THE COURT: How many times do you want them to answer it
11 though?

12 MR. BURKE: If I get a full response to 5, I'll withdraw
13 the second set of discovery.

14 THE COURT: Well, but what she is saying is if you come
15 up with the second set, the answer to the second set will
16 suffice for this.

17 What does your second set of interrogatories, what does
18 it ask about this subject?

19 MR. BURKE: I don't have it with me, Judge.

20 THE COURT: Well, do you have it with you?

21 MS. GROH: I do have it with me, your Honor.

22 THE COURT: All right. Let's hear what it says.

23 MS. GROH: As an example, as plaintiff is indicating,
24 his request relating to the dialer, he asks for every single
25 document that relates in any way to our telephone equipment.

1 In our conversations --

2 THE COURT: This one says for you to identify and
3 explain the written and unwritten policies, practices, et
4 cetera.

5 MS. GROH: Sure, and in our conversations pursuant to
6 Rule 37 plaintiff clarified that he was looking for the dialer
7 manuals. In his second set of requests he specifically
8 requests the dialer manuals, which we are happy to produce
9 when they are due on December 20th, which is two weeks from
10 today.

11 THE COURT: Do you agree that that's what you wanted
12 here?

13 MR. BURKE: I mean, Judge, I issued that second set of
14 discovery to appease the defendant. I mean, we had a long
15 discussion about whether document request 19 that's on the
16 same page as interrogatory 5 sufficiently asks for telephone
17 manuals. It asks for all manuals, communications and other
18 documents related to telephony, hardware, software and other
19 telephone equipment. I mean, these requests are reasonable.
20 I'm asking him -- because these are the most basic requests.

21 THE COURT: This is the point that's being made. The
22 point that's being made is you have got a more restrictive
23 apparently interrogatory or document request on the same
24 subject and that, as a result of your conference, that was
25 something you agreed to that that's what you wanted. So why

1 do you want this?

2 MR. BURKE: No, Judge, I didn't agree that the second set
3 of discovery was going to supersede the first set of
4 discovery. I mean, when I issued those requests I was still
5 seeking responses to these requests for which I have no
6 responses.

7 I'm willing at this point to withdraw the second set of
8 discovery and seek full responses to this discovery.

9 MS. GROH: Judge, I would suggest that we wait two weeks
10 and let us respond to the second set of discovery and if
11 plaintiff still has some issue with our responses, then he can
12 renote this motion, but at this time I believe it's
13 premature to address these issues when our discovery isn't due
14 for two weeks.

15 MR. BURKE: This discovery has been due for three months.
16 And I have been working for three months --

17 THE COURT: He has just withdrawn his second set, so
18 your argument with regard to the second -- the second set no
19 longer exists. It is withdrawn as of record.

20 All right. Now, why can't you answer Interrogatory
21 No. 5?

22 MS. GROH: Interrogatory No. 5 is overly broad and
23 unduly burdensome, and that's the basis of our --

24 THE COURT: Explain the written policies in document
25 request No. 5, come up with all the documents, why can't you

1 do that?

2 MS. GROH: As we objected, your Honor, this request is
3 asking for every single document. It's not tailored at all in
4 any way to the circumstances of this case. As we have
5 identified to the plaintiff, we don't have any class
6 information so his claim is based on one phone call that was
7 made to the plaintiff. Based on that, this is completely
8 overbroad.

9 THE COURT: Well, this is a putative class action, isn't
10 it? It's a class action or an attempt at a class action. So
11 you're saying this is not relevant? What is your answer?

12 MS. GROH: Our answer is that it's overbroad. He is
13 asking for every single policy --

14 THE COURT: I don't think it's overbroad at all. The
15 motion to compel interrogatory No. 5 and document request No.
16 5 is granted. Okay, next.

17 MR. BURKE: Let's see, document request 3, a copy of the
18 recordings that the defendant used with its dialer to make
19 these unsolicited telephone calls.

20 MS. GROH: I'm sorry, what number was that?

21 MR. BURKE: Document request 3. Just by matter of
22 background, your Honor, the TCPA portion of this case has to
23 do with prerecorded telephone solicitations to purchase or to
24 sell tax software.

25 THE COURT: Yes, I read the complaint.

1 MR. BURKE: Okay.

2 MS. GROH: Our response to document request No. 3 in our
3 Rule 37 conference with plaintiff is that we have no recording
4 of this phone call.

5 THE COURT: Well, did you answer to that effect?

6 MS. GROH: We indicated to plaintiff that we would
7 supplement our answer to that effect.

8 MR. BURKE: Judge, I suspect that we have a little bit --
9 and maybe I'm wrong, but a little bit of sharpshooting going
10 on here. What counsel just said is they have no recording of
11 the telephone call to plaintiff, but what we're asking for
12 here is a copy of the recordings that they used with their
13 dialer during the class period.

14 MS. GROH: To the plaintiff's phone number.

15 MR. BURKE: Or any other person in the class.

16 THE COURT: It says and for the call to any person
17 responsive to interrogatory No. 3.

18 MR. BURKE: Which is the class list for the
19 interrogatory.

20 THE COURT: So that's a recording more than just to the
21 plaintiff's telephone number.

22 MS. GROH: We indicated to plaintiff that we would agree
23 to supplement this.

24 THE COURT: So you agree that you will provide this?

25 MS. GROH: My understanding is that we have no data on

1 this, so we would supplement our response to state that.

2 THE COURT: Then what do you mean you're going to
3 supplement?

4 MS. GROH: We would supplement our response to the
5 interrogatory -- to the request to produce to state that there
6 is no copy of any recordings responsive to this request.

7 THE COURT: Well, if there is no -- it's hard to believe
8 that there is no copy. So I think what you need to do is also
9 provide, have somebody from the company provide what search
10 they made, what happened to any recordings, when it happened.
11 You have got to get into the detail of the search and the
12 detail of whatever happened to these recordings or this
13 recording.

14 MR. BURKE: I suspect that where they're coming from is
15 they're going to say "Well, we don't know which recording we
16 used with which class member." And I think that the document
17 request -- or maybe they just destroyed the recording, I'm not
18 sure.

19 THE COURT: I don't know, and there is no point in your
20 speculating or the court speculating. I want a detailed
21 response as to what happened to any recordings, when it
22 happened, under whose authority it happened, what the search
23 consisted of, and any other detail with regard to why these
24 recordings -- why you don't have these recordings at this
25 time.

1 MS. GROH: Sure, Judge.

2 THE COURT: Next.

3 MR. BURKE: Judge, skipping over 13 because I think that
4 it's included in document request 15.

5 THE COURT: Okay.

6 MR. BURKE: All documents, contracts, e-mails, or
7 agreements concerning use of your predictive dialer for
8 recorded messages.

9 THE COURT: E-mails or agreements. I don't even
10 understand what you mean there. What agreements are you
11 referring to?

12 MR. BURKE: Well --

13 THE COURT: You buy an autodialer and it dials.

14 MR. BURKE: Well, when we filed the case I wasn't sure if
15 they did the dialing in-house or out of house, so we have
16 learned at least through counsel's representation to Judge
17 Dow, not through these discovery responses, that the defendant
18 has an in-house dialer. So you know, if there are
19 communications with -- pardon me, contracts, maybe there is a
20 contract for purchase of the dialer or maintenance of the
21 dialer. Perhaps if there is a third-party that's --

22 THE COURT: What's the relevance of that?

23 MR. BURKE: Well, say, for example, they have a
24 third-party vendor maintain the dialer and that third-party
25 vendor has access to or has downloaded data regarding which

1 calls it made to whom at what time, the very data that the
2 defendant says does not exist, that would be -- the identity
3 of that third-party would be revealed in the response to
4 document request 15.

5 Similarly, I suspect, although counsel says it's not
6 true, that when sales associates wanted to do a dialer
7 campaign, they e-mailed somebody saying "Hey, I want to do
8 this dialer campaign, you know, please, have the dialer call
9 this set of people from the database," that information would
10 be probably in an e-mail or a memo.

11 Defendant tells me that the sales agents walked over to
12 this guy Brian Holbrook at the office in Atlanta and verbally
13 asked for a dialer campaign to be done and the dialer campaign
14 was done without any, any documentation at all.

15 MS. GROH: To that, Judge, as we told plaintiff in our
16 Rule 37 conference, mostly what was done was, you know, in
17 sales everything has to be prompt and fast. It was mostly
18 face-to-face contact. There may have been some e-mails that
19 were sent. However, the information that was contained in the
20 e-mails was contained in scripts that were run against the
21 database, which we have, we have copies of the script and
22 we're happy to provide that to plaintiff's counsel. They're
23 more inclusive and more responsive than the e-mails
24 themselves, so we feel that those would be irrelevant.

25 THE COURT: I think document request 15 is not too broad

1 and I think it ought to be answered. It certainly is relevant
2 as to what was told to who with regard to doing these dialings
3 and, of course, what the script was. So all documents -- I'm
4 not so sure that the purchase of a dialing system, I don't
5 think you need to provide any contract with regard to that,
6 but any other use of the dialing system, documents, contracts,
7 e-mails or agreements, that certainly is relevant and not very
8 broad at all. So the motion to compel document request 15 is
9 granted. What's next?

10 MR. BURKE: Skipping down to 19, please.

11 THE COURT: Okay.

12 MR. BURKE: Manuals, communications, other documents
13 relating to the telephony hardware, software and other
14 telephone equipment. What I understand --

15 THE COURT: Is that a -- telephony, is that on purpose?

16 MR. BURKE: Yes, I think that's a word.

17 THE COURT: Is it really a word?

18 MR. BURKE: Telephony.

19 THE COURT: Telephony.

20 MR. BURKE: Yes.

21 THE COURT: I'll go look it up.

22 MR. BURKE: What we are looking for here, Judge, is --
23 well, based on Rule 37 talks we understand that there is some
24 database from which the telephone numbers that the dialer
25 called is taken. We understand that there is a dialer and

1 that there is some process by which the -- that the sales
2 agents asked Brian Holbrook to make these calls. Of course, we
3 don't have the full responses to interrogatory 5 so I don't
4 have anything sworn that says that this is what happens, but
5 this is what has been explained to me.

6 In order to hire an expert, which I think I'm going to
7 have to do in this case to help me sort through this, through
8 this E discovery, I need to know what type of telephones they
9 have, what kind of dialer they have, what kind of database
10 this is that operates with the dialer to make these calls, and
11 how these things interact. So that's the primary basis for
12 the document request.

13 MS. GROH: If I may respond to that, your Honor, just,
14 as plaintiffs describe in detail, that's the type of discovery
15 request that we could respond to, but in this discovery
16 request where he is asking for all manuals, communications and
17 other documents related to all of our telephone software and
18 hardware, he is not limiting it to the dialer in issue. It's
19 all --

20 THE COURT: The motion to compel is granted with regard
21 to the automatic dialing system rather than all telephones.

22 MR. BURKE: So the telephone --

23 THE COURT: It excludes regular telephone calls.

24 MR. BURKE: Okay, we will work with that. I think that
25 there may be overlap, so there --

1 THE COURT: Well, yes, certainly there may be overlap,
2 but you're not entitled to all of their information regarding
3 their regular telephone system.

4 MR. BURKE: I don't care about that stuff.

5 THE COURT: Just the auto dialling. So the motion to
6 compel is granted to that limited extent only. Next.

7 MR. BURKE: Going back to section 8 please, page 6.

8 THE COURT: Yes.

9 MR. BURKE: These materials have to do with the class
10 list and documents and data concerning the class members.

11 THE COURT: Are you talking about interrogatory 3 or
12 what?

13 MR. BURKE: Interrogatory 3 -- beginning with
14 interrogatory 3, your Honor.

15 THE COURT: All right. I'll read it.

16 (Pause)

17 THE COURT: Counsel, why don't you respond.

18 MS. GROH: As we have indicated to plaintiff's
19 counsel --

20 THE COURT: Pardon?

21 MS. GROH: As we have indicated to plaintiff's counsel
22 in our Rule 37 conversations, we do not have any responsive
23 class data.

24 THE COURT: You don't have the intended recipient, you
25 don't have communications attempted and completed, from the

1 recipients of these auto dialers?

2 MS. GROH: No, your Honor, there is no business reason
3 for us to keep that data. So they didn't keep it. So we have
4 no records of phone calls made within this class period.

5 THE COURT: How about the people who responded? Didn't
6 somebody respond and buy your client's material?

7 MS. GROH: I can't say.

8 THE COURT: They were auto dialed and they responded.
9 You can't tell me you don't know them.

10 MS. GROH: The records that we have don't, don't
11 indicate that one way or the other. We don't have any records
12 to show the calls that were made.

13 MR. BURKE: Furthermore, I suspect that they have a Do
14 Not Call list subject to the federal Do Not Call regulations.
15 Most states have similar Do Not Call regulations.

16 THE COURT: But you're asking here for the intended
17 recipient and the communications to and from the person and
18 where they got the personal information, including the e-mail
19 and telephone number for these people.

20 MR. BURKE: Yes.

21 THE COURT: You don't have any documents with regard to
22 that?

23 MS. GROH: I'm telling you that we can't, we can't
24 identify what phone calls were made from the dialer and we
25 have indicated this to plaintiff's counsel and we are willing

1 to supplement --

2 THE COURT: So you could be dialing these people over
3 and over and over again, right, since you don't know who you
4 dialed in the first place or the second place.

5 MS. GROH: That very well could be because that's not
6 information that we retain.

7 THE COURT: That's very difficult to believe. I want a
8 detailed exposition of how this works and why you do not have
9 the intended recipient of auto dialing. You didn't dial
10 everybody in these states, did you? It was limited in some
11 fashion. Where did you get that limitation from? You didn't
12 dial everybody, did you?

13 MS. GROH: No, we had a database that had prospective
14 customers, existing customers.

15 THE COURT: So you do have a list of prospective
16 customers. That's the source.

17 MS. GROH: But we do not have information of who on that
18 list were called.

19 MR. BURKE: But they do have these database queries.

20 MS. GROH: Yes, we have the database queries and we have
21 a database but even if you cross reference them it won't
22 indicate whether a phone call was made to that person.

23 THE COURT: So once again, I say so that means you could
24 dial the same person twice or three times or ten times.

25 MS. GROH: That very well could be.

1 THE COURT: All right. I want the database and I want
2 you to, and to produce the database and a detailed exposition
3 of how this works.

4 MR. BURKE: I suspect that there are backup tapes or
5 something about the database that might help us recreate what
6 it looked like when these calls were queried.

7 MS. GROH: We have run this down from two different
8 angles, your Honor. We have looked at what was preserved and
9 then we have looked at what can be recreated, and as I have
10 said before, what was preserved is nothing, there is no
11 business reason for them to keep this data.

12 THE COURT: Well, you mean there was some of this
13 information and it wasn't preserved?

14 MS. GROH: There were calls that were made to --

15 THE COURT: There were calls that were made and the
16 second after the call was made you didn't know to whom it was
17 made?

18 MS. GROH: The way the dialer worked is it was
19 refreshed. If it was refreshed, then the numbers that were
20 loaded in the dialer were deleted, all the records were
21 deleted, or if it was not refreshed, after 30 days it just
22 overwrote over itself.

23 So there is -- there is no compelling business reason for
24 us to preserve any of the data from the dialer. What we have
25 done is, you know, try to figure out what was preserved, what

1 could be on the tapes, which is nothing, and then we have
2 tried to recreate what numbers were called based on what we
3 have. There are a number of deficiencies with that process,
4 though, and like I said before, you can run the scripts
5 against the current database that we have. However, we don't
6 have a historic database to indicate what calls -- what was in
7 the database at the time that these calls were made within the
8 class period.

9 And although we have the scripts, if you cross reference
10 the scripts against our current database, that still doesn't
11 show whether or not a call was made, it just shows that a list
12 was made based on that information.

13 THE COURT: Well, take us through the list, the list
14 from which everything was made and the entire process --

15 MS. GROH: We would be happy to do that --

16 THE COURT: -- because it's difficult to believe that a
17 company would not keep track of who they called. It's very
18 difficult to believe.

19 MS. GROH: I understand that, but as -- the way this
20 business worked is they kept track of their customers, their
21 existing customers was very important to them, but prospective
22 customers were not as significant for them to keep track of.
23 So that wasn't something --

24 THE COURT: But you would think that a company would
25 then eliminate them so that they wouldn't bother -- they

1 wouldn't call them again, they wouldn't -- they wouldn't have
2 any expense with regard to promoting those prospects.

3 MS. GROH: And that's something that did happen within
4 the database. The database itself was constantly changing.
5 People were kicked out, people were added in, depending on --

6 THE COURT: But the next day suppose you told the
7 database or you told the machine do 10,000 others. Did the
8 machine know who it did the day before?

9 MS. GROH: My understanding is no, your Honor, but if a
10 sales person had reached out to an individual who said "Please
11 don't call me any more," it would have kicked that person out
12 of the database. So that individual might not be in the
13 database anymore is my understanding of how it worked. We are
14 happy to detail this in our supplemental response to this
15 interrogatory.

16 THE COURT: Well, all right. Make a very detailed
17 response as to how it works and we will take it from there.
18 Next.

19 MR. BURKE: I suspect that the discussion that we just
20 had would be the same as to document request 37 and document
21 request 12, both on Page 6. Again, we are trying to figure
22 out who they called.

23 THE COURT: Let me ask you, the automatic dialer, does
24 the telephone company provide these for nothing? Do you get
25 billed by a telephone company?

1 MS. GROH: It's a phone record, so we --

2 THE COURT: So you get billed. So the telephone company
3 has copies of who you called, do they not?

4 MS. GROH: We have run down that angle as well, your
5 Honor. The way it worked is we had an internal switch on our,
6 at our company so that outbound calls all came from the same
7 number, the same three numbers, and there is no way to tell if
8 the call was made from the dialer or if the call was made from
9 a salesperson's desk.

10 THE COURT: Well, then let's include all the calls.
11 Let's include all the calls.

12 MS. GROH: But the fact that --

13 THE COURT: I would suspect that the regular telephone
14 calls made by people are way less than the automatic dialing,
15 right? They would have to be.

16 MS. GROH: I don't know if we can say that for certain,
17 Judge, but there is no way for us to tell which calls were
18 made from, you know, a salesperson to his wife or made from --

19 THE COURT: Well, maybe there is no way to tell at the
20 beginning, but maybe some further investigation will be able
21 to figure that out. All the telephone calls under these
22 circumstances, you provide this information on all the
23 telephone company -- all the telephone calls out of this
24 company. And if that is too inclusive, then such is life.
25 But it would include everyone who was called.

1 MS. GROH: In addition to --

2 THE COURT: Well, that's what these interrogatories are
3 looking for is who was called, and who was called is in that
4 list.

5 MS. GROH: Well, it should be narrowed to who was called
6 from the dialer.

7 THE COURT: Well, that would be nice, but you're saying
8 you can't do that. Then give us the entire list and let him
9 worry about who was called and who wasn't called. So the
10 motion with regard to document request 12 is granted.

11 Okay, next.

12 MR. BURKE: Page 7, Judge, affirmative defenses. I would
13 like to skip to 11 because I think 4 is subsumed in 11, which
14 is an interrogatory that asks for the facts and law that
15 supports their affirmative defenses.

16 THE COURT: Counsel.

17 MS. GROH: In our Rule 37 conferences with the plaintiff
18 we told him that our main affirmative defense or defense at
19 this time is that we got these phone numbers, we got the
20 plaintiff's phone number from the IRS.

21 THE COURT: How do you get the phone numbers from the
22 IRS? I saw that in these papers. I'm interested. How do you
23 get telephone numbers from the IRS?

24 MS. GROH: It was pursuant to a FOIA request.

25 THE COURT: Pardon?

1 MS. GROH: It was pursuant to a FOIA request to the IRS.

2 THE COURT: You mean you can get telephone numbers from
3 the IRS, telephone numbers of taxpayers so you can call them
4 from the IRS?

5 MS. GROH: Correct, your Honor. Our business is selling
6 tax software to businesses.

7 THE COURT: Yes.

8 MS. GROH: We got a list of businesses that filed a
9 certain number of tax returns on behalf of individuals. So
10 our marketing was towards businesses.

11 THE COURT: And you get that from the IRS. Does that
12 mean that these people consented?

13 MS. GROH: Our argument is that these are businesses and
14 not individuals.

15 THE COURT: And businesses have consented that their
16 income tax return information, some information from the
17 income tax return can be disseminated by the Internal Revenue
18 Service?

19 MS. GROH: Our position is that businesses are not
20 covered by the TCPA or the Do Not Call list, that by holding
21 out a phone number as your business, you're consenting for the
22 world to call you in that capacity.

23 THE COURT: Maybe they're not covered by the Do Not Call
24 list. What I'm talking about is if you're running a law firm,
25 that's a business, okay? You file an income tax return. Are

1 you consenting that your telephone number can be provided to
2 John Fisher here by filing an income tax return?

3 MS. GROH: I think the issue that we are arguing is a
4 little different than that, but that would be subject to the
5 FOIA document request, which is something that is exactly what
6 can be done.

7 THE COURT: I'm trying to understand how this works so I
8 can rule fairly on these discovery requests and I still can't
9 understand, it's beyond me that the IRS would provide
10 telephone numbers of its taxpayers, whether they're corporate
11 or individual, to anybody.

12 MS. GROH: That's exactly what happens and that's what
13 happened here. But our defense is a little bit different.
14 It's that these are businesses that were holding themselves
15 out under these numbers and those are the numbers we called,
16 and as a result of that --

17 THE COURT: And did they consent?

18 MS. GROH: We believe they did consent by using these
19 numbers as their business numbers, which would not be
20 covered --

21 THE COURT: They consented by filing the income tax
22 return which contained their telephone number?

23 MS. GROH: Holding themselves out as a business. We
24 believe that you can contact businesses in that capacity,
25 which would not be covered by the TCPA or the Do Not Call

1 list.

2 THE COURT: Holding -- once again, your law firm is a
3 business. You file an income tax return with the government.
4 Are you by so doing -- you hold yourself out as a business,
5 are you by so doing consenting that the IRS provide or
6 disclose your telephone number?

7 MS. GROH: Well, the IRS is a separate entity. We would
8 say --

9 THE COURT: Yes, I know it's a separate entity.

10 MS. GROH: -- you are consenting.

11 THE COURT: I know it's a separate entity, but I'm
12 talking about the consent part of the taxpayer. Have you by
13 so doing consented?

14 MS. GROH: We would say yes, your Honor.

15 THE COURT: All right.

16 MR. BURKE: There are six affirmative defenses, Judge.
17 We are asking for them to explain them.

18 THE COURT: All right. Well, you talk about affirmative
19 defenses that haven't yet been made. I don't think they need
20 to explain those.

21 MR. BURKE: Well, not now.

22 THE COURT: No. So why can't you respond to that?

23 MS. GROH: We indicated to plaintiff's counsel that we
24 would supplement our response to state that our defense is
25 that the plaintiff in this case --

1 THE COURT: So you will respond to it?

2 MS. GROH: Yes.

3 THE COURT: So the motion to compel with regard to
4 Interrogatory No. 4 is granted in that any objections thereto
5 are being waived. The next one.

6 MS. GROH: If I could just clarify one point, your
7 Honor, we indicated that we would supplement to state the
8 defense I just explained, that the plaintiff consented by
9 holding out this number as its business number. Beyond that,
10 our investigation continues and at this time we can't identify
11 every affirmative defense or every defense that we may have,
12 every argument --

13 THE COURT: No, no, you don't have to explain any
14 affirmative defenses that you have not made.

15 MS. GROH: Okay. When you said, waiver, Judge, I just
16 wanted to clarify that we weren't waiving --

17 THE COURT: Only affirmative defenses that are stated in
18 your answer, in your pleading.

19 Okay, next. Anything else?

20 MR. BURKE: Document request 7, documents that concern
21 any person whose cell phone was called using the dialer, could
22 be persons who were within the class as defined.

23 MS. GROH: And again, your Honor, we don't have any
24 class information, and as far as the --

25 THE COURT: Just a moment, just a moment. Before you

1 respond, let me read it.

2 (Pause)

3 THE COURT: Okay, your response is?

4 MS. GROH: As we stated before, we have no information
5 about the class, what phone calls were made to these class
6 members. As far as the prior express consent, it's the same
7 defense that we stated before.

8 THE COURT: In other words, what you're saying is you
9 have no express consent from anybody, right?

10 MS. GROH: We are saying that we don't know who was
11 called so there is no way for us to say --

12 THE COURT: Go through your files of all your customers
13 and tell us who made an express consent, "express" meaning
14 they consented to you, they sent you a letter saying "It's
15 okay for you to call me."

16 MS. GROH: And as I have explained before, we don't have
17 any class data. We can't indicate what calls were made to
18 individuals and there is no way for us to track that down.

19 THE COURT: You can indicate as to those people who you
20 had contact with who responded to the autodialer.

21 MS. GROH: And we don't have a record of that
22 information. But we do have the same --

23 THE COURT: Now, wait a minute, wait. You also don't
24 have a record -- the autodialer calls John Jones Company.
25 John Jones Company calls you and says "I'm interested in what

1 the autodialer said." There is no follow-up, there is no
2 record?

3 MS. GROH: There is no way for us to track that down.

4 THE COURT: Why not? Can't you look in a file? A file
5 was created when somebody called and affirmatively responded
6 to the promotion. You can't tell me you have no records of
7 that. That's how you make your living.

8 MS. GROH: If someone called us in response to a
9 promotion, then there was no auto dial call. Maybe I'm not
10 following you, Judge.

11 THE COURT: If somebody called you and said "I was
12 called by your company, I'm interested," you have a record of
13 that, don't you?

14 MS. GROH: If that prospective customer became a
15 customer, then that entry would be in our --

16 THE COURT: Either became a customer or had
17 conversations regarding getting to be a customer.

18 MS. GROH: As far as tracking how that occurred --

19 THE COURT: No, that isn't what this asks. What this
20 asks is any documents with any of these people that showed
21 express consent to call them. I think that's what it asks
22 for, right?

23 MR. BURKE: Yes.

24 THE COURT: What you're saying is you have no such
25 documents?

1 MS. GROH: Correct.

2 THE COURT: Okay. Well, why don't you answer that way.
3 If that's the truth, then answer that way.

4 MS. GROH: And we have indicated to plaintiff that we
5 would supplement these responses accordingly.

6 MR. BURKE: No documents supporting the affirmative
7 defenses, fine with us.

8 THE COURT: Okay, what else?

9 MR. BURKE: Page 11, Judge, information concerning the
10 plaintiff. The defendant has refused to provide us with
11 information that it has regarding the plaintiff. We have
12 asked for that stuff. They're saying we don't get it.

13 MS. GROH: We identified one document that we have that
14 has the plaintiff's name, his address, his phone number, the
15 name of his business. Before we produce this to the
16 plaintiff, we would like to have it covered by the protective
17 order.

18 THE COURT: What protective order?

19 MS. GROH: We have been working on getting a protective
20 order entered in this case.

21 THE COURT: What do you need a protective order for
22 plaintiff's information? Plaintiff waives that, doesn't
23 plaintiff?

24 MR. BURKE: As long as they don't put it in the public
25 record for discovery purposes, absolutely.

1 MS. GROH: Out of an excess of caution, the plaintiff is
2 suing --

3 THE COURT: Out of an excess -- it's excessive caution,
4 not an excess of caution. You have -- if I tell you "Look,
5 this is my telephone number, you can tell John Jones my phone
6 number and you can tell John Jones everything you know about
7 me," you need a protective order after that if the party says
8 do it?

9 MS. GROH: In this case the plaintiff is suing us for
10 violation of his privacy. Out of an excess of caution it
11 would be our preference to designate that document as
12 confidential.

13 THE COURT: The motion to compel on that is granted.
14 You give them all information that you have. You can work out
15 protective orders generally, but with regard to plaintiff's
16 information that plaintiff is requesting, that's a ridiculous
17 position. It is ridiculous. The plaintiff wants you to tell
18 the plaintiff what information you have on the plaintiff.

19 MS. GROH: Okay.

20 THE COURT: And you have an excess of caution --
21 baloney. Next.

22 MR. BURKE: Page 12, Judge, materials bearing on
23 willfulness. Treble damages are available if we can prove
24 that the violation is willful. These requests are designed to
25 show that the defendant knew about the TCPA and made these

1 calls anyway.

2 THE COURT: Complaints, written complaints, lawsuits.

3 MS. GROH: We object to this, your Honor.

4 THE COURT: Pardon?

5 MS. GROH: We object to this. Any complaint that was
6 filed against defendant does not have any bearing on this
7 case, it would never be admissible in court. And it's -- it's
8 just plainly irrelevant and overbroad.

9 THE COURT: I disagree. If the complaints are the same
10 or similar, that somebody was called without their permission,
11 that shows knowledge, that shows intent, that shows or may
12 show -- all of these things may tend to show willfulness.
13 Willfulness has something to do with punitive damages.

14 MS. GROH: Your Honor, if I may, the, just the fact that
15 a plaintiff lodged an allegation against the defendant would
16 not bear on willfulness --

17 THE COURT: Oh, no, it's not --

18 MS. GROH: That case could be dismissed, that case could
19 have been subject to Rule 11 sanctions.

20 THE COURT: That's very true, that's very true, but we
21 are not talking about admissibility into evidence right now,
22 we are talking about discovery. How is he to know what may be
23 admissible and what may not be admissible unless he has the
24 information?

25 MS. GROH: I would again say that this is overbroad and

1 perhaps a judgment that was entered against the defendant in a
2 circumstance similar to this could be relevant to willfulness,
3 but as far as every allegation --

4 THE COURT: Suppose you settled 10,000 of these
5 complaints individually. You mean to say -- so there is no
6 judgment. Isn't that potentially relevant?

7 MS. GROH: We would say no, your Honor.

8 THE COURT: I disagree with you. I think it's
9 potentially relevant, the multiplicity -- I don't know if it
10 is and I'm not ruling that it is, don't get me wrong. I'm not
11 ruling that it's admissible. What I am ruling is first you
12 have to get the facts. Once you get the facts, you will know
13 whether something is admissible or not. It may lead to
14 admissible evidence and that's the standard. Therefore, the
15 motion to compel with regard to that is granted.

16 MR. BURKE: So that would be, Judge, request 23, 24, 25
17 is similar, your Honor, it asks for documents from any source
18 concerning the legality or propriety of making dialer calls.

19 THE COURT: I would say all documents from any source
20 other than the defendant's own lawyers.

21 MR. BURKE: They have already told us that there are no
22 such documents.

23 THE COURT: Pardon?

24 MR. BURKE: They have told us that there are no such
25 documents, no documents subject to privilege.

1 THE COURT: All right. So -- no such documents subject
2 to privilege.

3 MR. BURKE: That's right, they put that in their papers
4 that there are no privileged documents.

5 THE COURT: Motion to compel request No. 5 is granted.

6 MR. BURKE: 25, your Honor?

7 THE COURT: Yes.

8 MR. BURKE: Okay. Documents that discuss defendant's
9 compliance or lack of compliance with the TCPA.

10 MS. GROH: Again, your Honor, we will argue that this
11 does not bear on willfulness. Perhaps if this was an FDCPA
12 case and there was a bona fide error defense, it could be
13 relevant, but as far as this case goes, the compliance or lack
14 of compliance with the policies and procedures in this regard
15 are not relevant and this motion should be denied.

16 MR. BURKE: It's the same thing as with the complaints.
17 I mean, if you have got a hundred e-mails that were sent a
18 month before the autodialer called the plaintiff, it shows
19 that the defendant knew that they were taking a chance.

20 THE COURT: I agree. Document request 26 is granted for
21 the same reason. Next.

22 MR. BURKE: 31.

23 THE COURT: That's the same thing.

24 MR. BURKE: Same thing. 32 is similar as well.

25 THE COURT: Granted, granted. And No. 32 --

1 MS. GROH: Your Honor, if I could clarify --

2 MR. BURKE: 32 we withdraw. That has to do with the
3 e-mail claim and there is a stay of discovery having to do
4 with the e-mail claim.

5 THE COURT: All right.

6 MR. BURKE: 35. 35 is a little bit different than 31 in
7 that it has to do with revocation of consent. For example,
8 somebody has called in to defendant and said "Hey, don't call
9 me," I think that would probably be subsumed in 31 and 26, but
10 this one is a little bit more explicit.

11 THE COURT: Well, you do, maintain a Do Not Call list,
12 right?

13 MS. GROH: Currently we do, your Honor, and I don't know
14 the time frame on that, but again, within the class period we
15 don't have any data that would be responsive to this.

16 THE COURT: Well, you have documents -- you have some
17 documents which list Do Not Call. You must have some sort of
18 a procedure as to what happens when somebody says "Don't call
19 me," right?

20 MS. GROH: I'm not sure if it's a written procedure or
21 if it's a --

22 THE COURT: Well, you're not sure, answer it. You don't
23 have to create any documents, all you have to do is answer it.
24 And come up with the documents that you have. Request No. 35
25 is granted.

1 MR. BURKE: 39, your Honor, another arm of what CCH does
2 is they publish legal treatises for compliance with marketing
3 and advertising laws.

4 THE COURT: I know about CCH. I used to use them. They
5 were pretty tough to use when I was in law school. Maybe
6 they're a lot better now.

7 MR. BURKE: They're organized by date rather than by
8 subject. Your Honor, we are asking for anything -- and I
9 think this is included in 25, maybe some of the other
10 requests, but expressly we are asking for their legal
11 treatises and updates that have to do with TCPA compliance.

12 MS. GROH: And, your Honor, I see no relevance in this
13 whatsoever.

14 THE COURT: I don't think it's relevant either. If you
15 want to, look them up. They're published, aren't they?

16 MS. GROH: Correct.

17 THE COURT: These are treatises. They're published, you
18 can look them up.

19 MR. BURKE: I haven't been able to find one, your Honor.

20 THE COURT: Well, so maybe --

21 MR. BURKE: On eBay, not in the library, not anywhere
22 else.

23 THE COURT: Well --

24 MR. BURKE: And we are asking to show knowledge of
25 these -- of the TCPA.

1 THE COURT: I don't think it's relevant however.

2 MR. BURKE: Okay.

3 THE COURT: Their exposition of the law, I don't think
4 that's relevant.

5 MR. BURKE: Organizational charts of the defendant.

6 THE COURT: What else -- where are you at?

7 MR. BURKE: Sorry, Judge. We are almost done. Page 14.

8 THE COURT: Organization charts.

9 MR. BURKE: Both of personnel and the corporate structure
10 of the defendant.

11 THE COURT: What's the relevance?

12 MR. BURKE: Well, as to personnel I want to know where
13 Brian Holbrook, this autodialer guy, where he falls, who his
14 boss is, who works underneath him.

15 THE COURT: Why don't you ask that specifically. You
16 want an entire organizational chart for a company that's been
17 in existence a long time and is a large company. You don't
18 need to know all that, do you? If you want something specific
19 about specific people that are involved with the autodialer,
20 okay, but --

21 MR. BURKE: I don't think -- I suspect they're not going
22 to have a chart that just deals with Brian Holbrook, but any
23 chart that includes Brian Holbrook I think would be
24 appropriate.

25 MS. GROH: Judge, I would agree with you that this is

1 plainly irrelevant and overbroad, and as you stated, this is a
2 large company with a lot of players and personnel --

3 THE COURT: If you want anything specific, you can ask
4 something specific, but I think this is overly broad and is
5 irrelevant and therefore, that motion is denied.

6 MR. BURKE: Judge, we don't have an insurance policy from
7 the defendant.

8 MS. GROH: On this point, your Honor, we were seeking to
9 enter a protective order before disclosing this proprietary
10 business contract with a third-party.

11 THE COURT: Can I ask you what's proprietary about an
12 insurance policy?

13 MS. GROH: It's a private contract that is commercial
14 information under Rule 26(c).

15 THE COURT: It's a private contract. You have already
16 disclosed what company.

17 MS. GROH: Pursuant to our Rule 26 obligations, we
18 have --

19 THE COURT: So --

20 MS. GROH: -- identified the policy limits --

21 THE COURT: If somebody wanted to call that company and
22 say "Look, I would like to have a liability policy that covers
23 the following," they would present that policy, wouldn't they?
24 They should be happy with that. I don't understand what's so
25 proprietary. Everything these days is proprietary and

1 confidential. How does it hurt you -- how does a competitor
2 gain an advantage over your liability insurance policy for
3 heaven's sake?

4 MS. GROH: It's our position, your Honor, that it's
5 commercial information that should be protected --

6 THE COURT: Why?

7 MS. GROH: -- from disclosure.

8 THE COURT: Why? What I'm trying to get at is why.
9 You're not the only one. The lawyers now, everything is
10 proprietary and everything is confidential. That isn't the
11 way it's supposed to work. It's supposed to be secrets that
12 are subject to protective orders, not any other old document
13 that doesn't hurt you competitively.

14 Anyway, you're going to work on a protective order. The
15 motion with regard to the insurance -- produce the insurance
16 policy. Also, work on your protective order.

17 MR. BURKE: Judge, two more issues remain. One is that
18 there is no privilege log, but in their papers they said that
19 they're not withholding anything based on privilege, so I
20 think that's a non-issue.

21 THE COURT: Well, so we don't have to visit it.

22 MR. BURKE: And the final issue is an interrogatory that
23 I issued asking for essentially a privilege log of documents
24 that the defendant knows are responsive to the discovery
25 requests but they don't have in their possession, custody, or

1 control. And I have narrowed that interrogatory to dialer
2 documents.

3 THE COURT: I don't understand that. Documents that
4 they know exist, but they do not have any control --

5 MR. BURKE: I'm asking where they are so I can go get
6 them.

7 THE COURT: Well, it's not a privilege log.

8 MR. BURKE: No, it's sort of a log of what they don't
9 have.

10 THE COURT: It's a list.

11 MR. BURKE: Yes, it's a list.

12 THE COURT: A list of --

13 MS. GROH: Interrogatory No. 7 requests defendant
14 identify all responsive documents that are being withheld on
15 the basis of privilege or an objection. Defendant answered
16 that to say that there are none. Somehow plaintiff is still
17 moving to compel on this request.

18 THE COURT: There are none.

19 MR. BURKE: Well, I mean, your Honor, for example, there
20 are manuals that were not being produced before today that the
21 defendant was withholding based upon objection of overly
22 burdensome.

23 THE COURT: But they are going to produce them in
24 accordance with our rulings today.

25 MR. BURKE: For sure.

1 THE COURT: Okay.

2 MR. BURKE: What I'm asking for here, what I wanted was
3 for them to tell me is "Oh, we have got these manuals, but
4 we're not giving them to you because we think it's unduly
5 burdensome." If there is anything after today that they're
6 not giving me because of some objection, I would like to know
7 what it is. And if there is something that they don't have
8 custody of --

9 THE COURT: They have to give you everything they have.
10 If they know where something is and they do not have control
11 over it, ask them that specifically, but you didn't ask them
12 that in this interrogatory.

13 MR. BURKE: Not specific enough.

14 THE COURT: Therefore, the motion with regard to that
15 interrogatory is denied.

16 MR. BURKE: Judge, as to the protective order, this is
17 our last issue. There are two subjects that were, that the
18 parties are dealing with and I think that if we can resolve
19 them today, the defendant will probably be able to file a
20 motion for protective order.

21 One, I would like to have a sentence in Paragraph 1 that
22 says "Nothing herein shall expand or restrict the scope of
23 materials that may be designated as confidential pursuant to
24 Rule 26 and applicable case law." The defendant finds that
25 objectionable.

1 MS. GROH: We have three objections to that, your Honor.
2 Frankly, we wouldn't have a problem if we cut that sentence
3 off at "Nothing herein shall expand or restrict the scope of
4 materials that may be designated as confidential," period.
5 The remaining part of the sentence, however, restricts the
6 designation of confidential materials while the first part of
7 the sentence expands it. We find that to be contradictory
8 and --

9 THE COURT: But you still have a provision that says if
10 somebody challenges that, you can go to court and the court
11 can determine that.

12 MS. GROH: Exactly, which is why we don't think that
13 this provision is necessary because there is a provision later
14 on on how to challenge the designation of a document.
15 Additionally, this "pursuant to Rule 26(c) and applicable case
16 law" is just a vague statement that we find to be unnecessary
17 and unclear.

18 MR. BURKE: Earlier in the paragraph it says that the
19 defendant or any party -- first it said defendant only -- can
20 make any document that's not previously made available to the
21 public confidential in this case.

22 THE COURT: All right.

23 MR. BURKE: I think that's too broad. I don't see --

24 THE COURT: Well, then you can challenge -- there is a
25 challenge provision here, isn't there?

1 MR. BURKE: There is.

2 THE COURT: So challenge it when the time comes,
3 challenge it.

4 MR. BURKE: As long as I don't get stuck with some
5 argument that says oh, the law of the case is that any
6 document that wasn't previously disclosed to the public, the
7 order already tells us that it's confidential. That's what
8 I'm worried about. And I think that any motion challenging
9 confidentiality, we are going to be arguing Rule 26(c) and
10 applicable case law.

11 THE COURT: Have the words "subject to the challenge
12 provisions as shown in paragraphs" whatever they are, you can
13 add that, but make it subject to the challenge provisions.

14 MR. BURKE: And the second issue is that I think that
15 it's appropriate, and I have had this in other protective
16 orders, to have a provision that third parties that seek to
17 use the protective order in subpoena responses subject
18 themselves to the jurisdiction of this court for any disputes
19 or anything else having to do with their subpoenaed responses.

20 THE COURT: Well, they are anyhow. They are anyhow. If
21 you subpoena somebody and they don't want to come up with the
22 documents that you have subpoenaed, you come to court, you ask
23 that they be held in contempt of court.

24 MR. BURKE: I don't want to have to --

25 THE COURT: What do you need that for?

1 MR. BURKE: Well, say, for example, a subpoena issues out
2 of the District of Alaska.

3 THE COURT: Then you have got to go up to Alaska. We're
4 not going to circumvent that and say -- first of all, it
5 doesn't bind any of the third parties anyway. I can make all
6 kinds of orders with regard to that, they didn't agree, and
7 you're saying, well, if they look at it --

8 MR. BURKE: No, I'm saying if they use the protective
9 order, if they designate materials protected, confidential
10 under this protective order, they're submitting to the
11 jurisdiction of this court with regard to those documents.

12 MS. GROH: We don't think this language is necessary,
13 your Honor, and think it's overly burdensome to require a
14 third party to submit to the jurisdiction of this court.

15 THE COURT: I agree. It's an attempt to circumvent that
16 portion of the Rules that say, that have to do with where
17 disputes as to third-party subpoenas are resolved and I don't
18 think you can do that, and I don't think it's binding upon
19 them at all even if they use it. Therefore, the order is
20 don't put it in.

21 MR. BURKE: Very good.

22 THE COURT: Okay. You're going to submit a draft order
23 on this.

24 MR. BURKE: Okay.

25 THE COURT: All right. We will circulate it and --

1 submit a draft order.

2 MR. BURKE: I'm going to also order the transcript.

3 THE COURT: I think you're going to need to.

4 MR. BURKE: Okay.

5 THE COURT: All right.

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7 I certify that the above was transcribed
8 from digital recording to the best of my ability.

9
10 /s/ Lois A. LaCorte

11 _____
12 Lois A. LaCorte

13 Official Court Reporter
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